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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

JAMES S. GORDON, JR., an individual residing in Benton County, Washington, Plaintiff,	**No. CV-04-5125-FVS**
vs.	
IMPULSE MARKETING GROUP, INC., A Nevada Corporation, Defendant.	
IMPULSE MARKETING GROUP, INC., Third-Party Plaintiff,	
vs.	
BONNIE GORDON, JAMES S. GORDON, III, JONATHAN GORDON, JAMILA GORDON, ROBERT PRITCHETT, and EMILY ABBEY, Third-Party Defendants.	DATE: September 23, 2005

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S AND THIRD-PARTY DEFENDANTS' MOTION TO DISMISS IMPULSE MARKETING, GROUP, INC.'S AMENDED COUNTERCLAIMS AND THIRD-PARTY AMENDED COMPLAINT AND IMPULSE MARKETING GROUP, INC.'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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Impulse Marketing Group, Inc. ("Impulse") submits this Memorandum of Law in opposition to the motion of plaintiff James Gordon ("Gordon") and third-party defendants Bonnie Gordon, James S. Gordon, III, Jonathan Gordon, Jamila Gordon, Robert Pritchett and Emily Abbey (hereinafter, the group of third-party defendants will collectively be defined as "Third-Party Defendants" and the group of Gordon and Third-Party Defendants shall collectively be defined as "Plaintiff")[1] to dismiss Impulse's Amended Counterclaims and Third-Party Amended Complaint pursuant to Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6), 56, or 9(b) (the "Motion").[2] Impulse cross-moves for partial summary judgment pursuant to F.R.C.P. 56 (the "Cross-Motion").

I. Gordon Lacks Standing to Bring Motion to Dismiss on Behalf of Third-Party Defendants

The Ninth Circuit recognizes a general prohibition against permitting a litigant to raise another person's legal rights. Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1108 (9th Cir. 2003). Generally, a party lacks standing to assert rights of third-parties. Id. at 1108. The constitutional components of standing ensure that a party has a personal stake in the outcome of the controversy. Id. at 1109. In the case at bar, Gordon lacks standing to bring the Motion on behalf of Third-Party Defendants because: (1) Gordon does not have a personal stake in the outcome of the third-party action; (2) there is no direct relationship between the claims asserted against Gordon and those brought against Third-Party Defendants; (3) Gordon cannot bind

[1] Officer Reed has not been served with the third-party amended complaint. The Court will entertain Impulse's motion to dismiss Officer Reed from the third-party action as Gordon has refused to stipulate to his dismissal.

[2] Gordon has improperly moved to dismiss Impulse's Third-Party Amended Complaint on behalf of Third-Party Defendants. Gordon lacks standing to impose arguments on behalf of Third-Party Defendants. Gordon's interests may be contrary to the interests of Third-Party Defendants. Further, Gordon is not permitted to bind Third-Party Defendants to his own positions and arguments.

Third-Party Defendants to his representations, admissions and positions; and (4) the interests of Gordon and Third-Party Defendants including, but not limited to, certain defenses that may be raised by Gordon and Third-Party Defendants in support of the amended counterclaims and third-party causes of action, may vary. It is conceivable that Third-Party Defendants can seek to assert claims against Gordon for, *inter alia*, mispersonation. Further, there is no indication that Gordon's counsel has appeared on behalf of Third-Party Defendants. Based on the foregoing, Third-Party Defendants have not made an appearance in the third-party action.

II. Procedural History

In 2003, Gordon filed an action against Commonwealth Marketing Group, Inc. ("CMG") (the "Related Action"). On November 23, 2004, Gordon filed the instant lawsuit against Impulse (the "Instant Action"). Gordon and his attorney have filed multiple actions against various defendants using similar, if not identical, theories of recovery in each action.

On or about January 21, 2005, Impulse moved to dismiss the Instant Action, as a matter of law, pursuant to F.R.C.P. 12(b)(6). This Court denied Impulse's motion to dismiss Gordon's complaint on or about July 11, 2005.

On August 1, 2005, Impulse filed five (5) counterclaims against Gordon and five (5) separate causes of action against each of the Third-Party Defendants. On September 7, 2005, Impulse filed Amended Counterclaims against Gordon and a Third-Party Amended Complaint against each of the Third-Party Defendants (collectively, "Claims").

In the Instant Action, Plaintiff argues that: (1) no factual basis exists for Impulse's Claims; and (2) even if one assumes the truth of all of Impulse's factual allegations contained in its Claims, Impulse still fails to state claims upon which relief can be granted.

Notwithstanding Impulse's amended Claims, on September 12, 2005, this Court ordered that the Plaintiff's prior submission applied to Impulse's amended pleadings.

III. Introduction

Gordon has no standing to argue or bring the Motion on behalf of Third-Party Defendants. As such, Third-Party Defendants have not issued an appearance in Impulse's third-party action. Despite Gordon's lack of standing to bring the Motion on behalf of Third-Party Defendants, and although Third-Party Defendants have not appeared in the third-party action, Impulse will oppose the Motion in its entirety out of an abundance of caution. As indicated above, any reference to "Plaintiff" shall encompass Gordon and each Third-Party Defendant.

Impulse has sufficiently alleged facts tending to show that Plaintiff has engaged in wrongful conduct by: (1) "untruthfully and inaccurately," "actively and affirmatively" soliciting commercial e-mail for the sole purpose of filing multiple lawsuits arising out of the receipt of such e-mail messages; and (2) fraudulently misrepresenting his identity to Impulse in violation of the terms and conditions (the "Agreement") of the USA Gold Card program (the "Program") (hereinafter, the "Scheme"). Such improper conduct subjects Plaintiff to actionable Claims for fraud and deceit, tortious interference with business relationships, breach of contract and injunctive relief.

The Program allows individuals to apply for a USA Gold Card online and, upon acceptance of their application, use their USA Gold Card to shop online and purchase products offered by USA Shop Smart and receive pre-approval for an unsecured Visa credit card.

Notwithstanding Plaintiff and Third-Party Defendants' improper conduct, material questions of fact are raised based upon the allegations contained in Impulse's amended pleadings as well as Plaintiff's own representations and contradictions made in the Related Action and the Instant Action.

With respect to Impulse's Cross-Motion for partial summary judgment pursuant to F.R.C.P. 56, Impulse maintains that R.C.W. §19.190 et seq. only protects the transmission of commercial e-mail to an individual "electronic mail address" and not to an entire "Internet domain name" as defined under R.C.W. §19.190.010. Based upon the statutory construction of R.C.W. §19.190 et seq., Plaintiff lacks standing, as a matter of law, to assert claims for damages on behalf of the entire "gordonworks.com" domain (the "Domain").

IV. Material Questions of Fact Exist That Preclude Summary Judgment

Notwithstanding Impulse's well-plead facts, Gordon's declaration dated August 15, 2005 in support of the Motion (the "Gordon Declaration") by itself raises material questions of fact. The Gordon Declaration asserts, under penalties of perjury, that:

- Gordon created numerous e-mail addresses by fictitiously using the names of his friends and family members that he identified as witnesses in his Initial Disclosures in the Related Action (the "Gordon Initial Disclosures"). See Exhibit "A" ¶3, annexed to the Declaration of James Bodie, dated September 23, 2005, for a copy of the Gordon Initial Disclosures in the Related Action[3] (the "Bodie Declaration");

- Although the e-mail addresses related to Gordon's family members, all of the e-mail addresses were purportedly "created and maintained" by Gordon, and e-mails sent to any of those e-mail addresses were "received" by Gordon himself. See Exhibit "A" ¶7 (emphasis added); and

- Gordon "used" certain e-mail addresses that belonged to his family and other witnesses. See Exhibit "A" ¶9.

By contrast, the Gordon Initial Disclosures in the Related Action reveals a material and factual inconsistency. Specifically, the Gordon Initial Disclosures state that Gordon's family

[3] This Court has already taken judicial notice of the Related Action in its Order Denying Defendant's Motion To Dismiss, dated July 11, 2005.

members, Pritchett and Abbey Gordon, rather than Gordon himself, received commercial e-mail. See Exhibit "A" ¶¶2-7 (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raise triable issues of material fact in the Instant Action. Such questions include:

- Whether or not Gordon and/or Third-Party Defendants received the commercial e-mail messages at issue in the Instant Action;
- Whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information in violation of the terms of the Agreement; and
- Whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners.

V. Standard of Review

Pursuant to F.R.C.P. 12(b)(6), the Court "may not consider any material beyond the pleadings in ruling." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). Further, a complaint should not be dismissed for failure to state a claim upon which relief may be granted under F.R.C.P. 12(b)(6) unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Johnson v. Knowles, 113 F.3d 1114, 1117 (9th Cir. 1997) (emphasis added). The Court is required to accept all of Impulse's Claims as true and construe them in the light most favorable to Impulse while giving Impulse the benefit of every inference that reasonably may be drawn. Tyler v. Cisneros, 136 F.3d 603, 607 (9th Cir. 1998); Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996). When the legal sufficiency of a complaint's allegations are tested with a motion under F.R.C.P. 12(b)(6), "[r]eview is limited to the complaint." Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993).

Gordon, personally, and ostensibly on behalf of non-appearing Third-Party Defendants, request that this Court alternatively convert the F.R.C.P. 12(b)(6) motion to dismiss into a F.R.C.P. 56 motion for summary judgment. As such, under Washington law, to make out a prima facie case for purposes of avoiding summary judgment, a defendant must allege for each element of a cause of action, facts that would raise a genuine issue of fact for the jury. Mark v. Seattle Times, 96 Wash.2d 473, 486 635 P.2d 1081 (Wash. 1981). To prevail on a motion for summary judgment the evidence must reveal no genuine issue of material fact when viewed in the light most favorable to the party opposing summary judgment. S.D. Myers, Inc. v. City & County of San Francisco, 253 F.3d 461, 466 (9th Cir 2001). The court in S.D. Meyers, Inc., stated that the threshold inquiry is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." S.D. Meyers, Inc. at 466. In making this determination, a court must view the evidence in the light most favorable to the non-moving party. Eichacker v. Paul Revere Life Ins. Co., 354 F.3d 1142, 1145 (9th Cir. 2004).

VI. The Gordon Declaration

This Court should give limited weight in considering the Gordon Declaration when deciding Plaintiff's F.R.C.P. 56 Motion for the following reasons:

- The Gordon Declaration generally offers several legal conclusions and hearsay without any supporting evidence;
- The Gordon Declaration specifically alludes to hearsay testimony by Officer Lew Reed yet fails to identify a single instance when an analysis of the commercial e-mail at issue occurred; and

- The Gordon Declarations allusion to Officer Reed's hearsay testimony offers a legal conclusion that the commercial e-mail at issue violate RC.W. §19.190 et seq. without reciting to any evidence whatsoever that the commercial e-mail at issue contained misrepresentations in the subject line or transmission path of any commercial e-mail message.

VII. The Declaration of Eric Castelli, co-founder and Chief Technology Office of LashBack LLC, dated August 10, 2005

As detailed in the Bodie Declaration, the declaration of Eric Castelli, co-founder and Chief Technology Office of LashBack LLC, dated August 10, 2005, (the "Castelli Declaration") is tarnished. Moreover, the Castelli Declaration offers testimony from an unnamed third-party. Hence, the Castelli Declaration is without evidentiary importance to this case.

Additionally, the Castelli Declaration is entirely irrelevant to the allegations contained in Impulse's Claims. In fact, the Castelli Declaration discusses Impulse's alleged documented violations of the CAN-SPAM Act of 2003 ("CAN-SPAM"). Such contentions are wholly unrelated to Impulse's Claims. The submission of the Castelli Declaration is even more puzzling in light of the fact that Plaintiff argued in his opposition to Impulse's own F.R.C.P. 12(b)(6) motion to dismiss his complaint that CAN-SPAM did not preempt R.C.W. §19.190 et seq. (emphasis added). Plaintiff cannot have it both ways.

VIII. Impulse's Fraud and Deceit Claims under F.R.C.P. 12(b)(6), 56 and 9(b)

A. F.R.C.P. 12(b)(6)

Contrary to Plaintiff's representations, Impulse's Claims state prima facie causes of action against Plaintiff for fraud and deceit.

In order to plead a valid cause of action for fraud under Washington law, the following elements must be alleged: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; and (9) his consequent damage. Baertschi v. Jordan, 68 Wash.2d 478, 482 413 P.2d 657 (Wash. 1966).

In the case at bar, Impulse's Claims allege sufficient facts tending to show all of the above-mentioned elements. To illustrate this point, we respectfully direct the Court to paragraphs 1 through 7 of Impulse's First Amended Counterclaim Against Gordon for fraud and deceit that details the elements of a fraud claim.

With respect to Impulse's Claims against Third-Party Defendants, Impulse has alleged sufficient facts tending to show all of the elements of a prima facie fraud and deceit cause of action. In this regard, Impulse alleges facts that create a material question of fact as to the identity of the recipient of the commercial e-mail at issue. Impulse respectfully refers the Court to its Second Cause of Action contained in its Third-Party Amended Complaint at paragraphs 8 through 14 that details the elements of fraud and deceit. Such allegations demonstrate that Impulse sufficiently pled all of the elements required to sustain its Claim for fraud and deceit. Specifically, Impulse alleges, *inter alia*, that Third-Party Defendants misrepresented their identity and registration information to Impulse, and/or its marketing partners, by permitting Plaintiff to use their registration information in an untruthful and inaccurate manner.

As previously detailed, the Gordon Declaration and the Castelli Declaration are beyond the scope of Impulse's Claims for fraud and deceit. Plaintiff has failed to set forth any evidence whatsoever, let alone any support beyond doubt, as required under F.R.C.P. §12(b)(6), that Impulse can prove no set of facts in support of its Claims for fraud and deceit.

B. F.R.C.P. 56

Plaintiff requests that this Court alternatively convert his F.R.C.P. 12(b)(6) motion to dismiss into a F.R.C.P. 56 motion for summary judgment. In doing so, Plaintiff requests that the Court consider the Gordon and Castelli Declarations, which are replete with hearsay statements and legal conclusions, in determining the merits of the Motion. For the reasons set forth above, both the Gordon Declaration and the Castelli Declaration are without any consequence to Impulse's Claims for fraud and deceit. Rather, both the Gordon Declaration and the Castelli Declaration raise triable issues of material fact that are clearly set forth hereinabove. As such, Impulse's Claims for fraud and deceit should not be dismissed based upon F.R.C.P. 56.

C. F.R.C.P. 9(b)

Plaintiff contends that this Court should, alternatively, require that Impulse plead its fraud and deceit Claims with particularity pursuant to F.R.C.P. 9(b). Plaintiff argues that Impulse should specifically allege and identify the content of any and all representations made by Gordon and Third-Party Defendants that Impulse alleges were fraudulent. Impulse's Claims for fraud and deceit provide sufficient specificity and particularity. For example, Impulse has set forth facts tending to show the specific dates when Gordon fraudulently represented to Impulse and/or its marketing partners that he was not whom he represented himself to be and sets forth the particular websites that Gordon certified to Impulse and/or its marketing partners that the information he was providing to Impulse and/or its marketing partners was truthful and accurate. See ¶8 through ¶14 of Impulse's First Amended Counterclaim against Plaintiff for fraud and deceit that details the specific elements of fraud. However, Impulse is hamstrung from providing even more particularity in its pleadings because the Court did not force Gordon to plead his claims with specificity further hampering Impulse's defenses, counterclaims and third-party causes of action.

Secondly, Impulse respectfully directs the Court to ¶15 through ¶21 of Impulse's Second Cause of Action against the Third-Party Defendants for Fraud and Deceit. In this regard, Impulse alleged date-specific instances as to when each Third-Party Defendant misrepresented their identity to Impulse and/or its marketing partners and on which particular website the applicable Third-Party Defendant misrepresented their identity to Impulse and/or its marketing partners.

Based upon the specific allegations contained in Impulse's Claims, Impulse has complied with F.R.C.P. 9(b).

IX. Impulse's Claims For Tortious Interference With Business Relationships under F.R.C.P. 12(b)(6) and 56

A. F.R.C.P. §12(b)(6)

Plaintiff maintains that Impulse did not sufficiently allege Claims for tortious interference with a business relationship. Plaintiff argues that even assuming Impulse's allegations to its Claims to be true, Impulse still cannot prevail against Plaintiff because either Gordon, or the Third-Party Defendants, received e-mail messages after each had requested that they stop receiving e-mails.[4] Plaintiff repeats this argument throughout the Motion. However, such an

[4] Gordon relies on the Exhibit "F" (a list of dates and websites of when and where Gordon and/or his family members requested that e-mail be sent to them) of the Declaration of Phil Huston, dated January 21, 2005 (the "Huston Declaration") in support of Impulse's F.R.C.P. 12(b)(6) motion to dismiss Gordon's complaint as evidence that Impulse somehow sent e-mail to him after someone requested that e-mail stop being transmitted to him. However, Gordon's interpretation of the Huston Declaration and Exhibit "F" is entirely mistaken. Contrary to

argument in and of itself raises a question of material fact as to who allegedly received the commercial e-mail at issue and who requested that they stop receiving such e-mail.

Notwithstanding that a material facts are in dispute, Impulse has sufficiently alleged all of the elements for its tortious interference with a business relationship Claim. Specifically, Impulse alleges, *inter alia*, that Plaintiff had knowledge of a valid contractual relationship between Impulse and/or its marketing partners. See Impulse's Second Amended Counterclaim and Third-Party Amended Complaint ¶30 through ¶33.

Impulse further maintains that Plaintiff: (1) registered for the Program; (2) certified that their information was accurate and truthful pursuant to the Agreement; and (3) entered into a Privacy Policy (the "Privacy Policy") that permitted Impulse and/or its marketing partners to share the applicable Program participant's registration information with contractually-bound third-party marketers. Accordingly, any denial by Plaintiff as to whether or not they had knowledge of Impulse's contractual business relationships is, at most, untrue, and, at least, for determination by a jury.

Under Washington law, in order to establish a prima facie case of the tort of intentional interference with business expectancy the following elements must be met: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. Ill will, spite, defamation, fraud, force, or

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Plaintiff's representations, Exhibit "F" does not reflect that Gordon and/or his family members "opted-out" to receiving "all" e-mails. Rather, Exhibit "F" merely indicates that Plaintiff "opted-out" of from receiving "some" e-mails. As a result, a question of fact arises as to if and when Gordon and/or his family member's "opted-in" again after such "opt-out" occurred.

coercion on the part of the interferor are not essential ingredients. Pleas v. City of Seattle, 112 Wash.2d 794, 800, 774 P.2d 1158 (1989) (quoting Calbom v. Knudtzon, 65 Wash.2d 157, 162-63, 396 P.2d 148 (1964)).

Impulse adequately alleges that it relied on the intentional, active, affirmative, untruthful and inaccurate representations of Plaintiff by negotiating and fulfilling marketing agreements with Impulse's third-party business partners. Due to the "untruthful and inaccurate" representations of Plaintiff including, but not limited to, his improper actions and Scheme, Impulse appropriately alleges that it is likely to sustain, and has sustained, a loss of business relationships with its online marketing business partners (emphasis added). The extent of the damage to Impulse continues to be calculated because the damage to Impulse's good will and lost business are difficult to compute.

As indicated above, the Gordon and Castelli Declarations are inadmissible hearsay documents, consist of conclusory statements and are beyond the scope of Impulse's Claims for tortious interference with business relationships. Accordingly, Plaintiff has failed to meet his burden to demonstrate that Impulse can prove no set of facts in support of its Claims for tortuous interference with business relationships based upon F.R.C.P. 12(b)(6). In light of the fact that this Court is required to take the allegations contained in Impulse's Claims for tortuous interference with business relationships as true and construed in the light most favorable to Impulse while giving Impulse the benefit of every inference that reasonably may be drawn, the Court should deny the Motion. Epstein 83 F.3d at 1140; Tyler 136 F.3d at 607.

B. F.R.C.P. 56

Plaintiff seeks to convert his F.R.C.P. 12(b)(6) motion to dismiss into a F.R.C.P. 56 motion for summary judgment. In doing so, Plaintiff requests that this Court consider the Gordon Declaration and Exhibit "F" of the Huston Declaration. Plaintiff contends that the Huston Declaration and the Gordon Declaration establish that all of the e-mails that form the basis of the dispute in the Instant Action were sent by Impulse and received by Gordon after Gordon requested that Impulse stop sending any further e-mail to him (emphasis added).

However, Gordon's reliance on Exhibit "F" of the Gordon Declaration is at most, puzzling and at least, creates a question of fact for the jury. Gordon maintains that Exhibit "F" of the Huston Declaration is evidence that Impulse somehow sent e-mail to him after someone requested that e-mail stop being transmitted to him. However, Gordon's interpretation of the Huston Declaration and Exhibit "F" is entirely mistaken. Contrary to Gordon's representations, Exhibit "F" does not reflect that Gordon and/or his family members "opted-out" to receiving "all" e-mails. Rather, Exhibit "F" merely indicates that Plaintiff "opted-out" of from receiving "some" e-mails. As a result, a question of fact arises as to if and when Gordon and/or his family member's "opted-in" again after such "opt-out" occurred.

Further, a comparison of the Huston Declaration to the Gordon Declaration simply raises a factual question as to who received the commercial e-mail at issue in the Instant Action and requested that Impulse and/or its marketing partners stop sending any further e-mail. The Gordon Initial Disclosures in the Related Action further confuse this issue because the Gordon Initial Disclosures provide evidence that at least some Third-Party Defendants (Pritchett and Abbey Gordon), rather than Gordon himself, received commercial e-mail. Accordingly, any order granting summary judgment to Plaintiff is premature without the disclosure of factual discovery to resolve the facts in dispute. As such, the Motion should be denied.

X. Impulse's Claims For Malicious Prosecution under F.R.C.P. 12(b)(6) and 56

A. F.R.C.P. §12(b)(6)

Plaintiff argues that Impulse fails to state a claim for malicious prosecution upon which relief can be granted because Impulse fails to allege the elements of a malicious prosecution claim.

First, Impulse has alleged the elements of malicious prosecution in its entirety. Specifically, Impulse alleges that it suffered "special injury" that would not necessarily result in similar suits by averring that it lost business earnings and suffered damage to its business reputation and good will. As such, Plaintiff's argument that Impulse's malicious prosecution claim fails in this regard is simply untrue.

Secondly, reliance on the case Gem Trading Co. v. Cudahy Corp., 92 Wn.2d 956, 965 (1979) by Plaintiff actually strengthens Impulse's malicious prosecution Claim. In Gem Trading, the court determined that while actions for malicious prosecution began as a remedy for unjustifiable criminal proceedings, Washington law recognized such a remedy where a civil suit has been wrongfully initiated. See also R.C.W. §4.24.350(1); Hanson v. Estell, 100 Wn. App. 281, 286-87, 997 P.2d 426 (2000).

Third, in a malicious prosecution action, the element of malice takes on a more general meaning, so that the requirement that malice be shown as part of the prima facie case in an action for malicious prosecution may be satisfied by simply proving or pleading that the prosecution complained of was undertaken for improper or wrongful motives or in "reckless disregard" of the rights of the party asserting the malicious prosecution claim. iPeasley v. Puget Sound Tug, 13 Wn.2d 485, 496, 125 P.2d 681 (1942).

In the case at bar, Impulse has alleged that Plaintiff was improperly and wrongfully motivated when they participated in the Scheme. Simply put, Plaintiff recklessly disregarded Impulse's contractual rights to receive truthful and accurate registration information. Nonetheless, whether the actions of Plaintiff manifested "reckless disregard" for Impulse's rights is a factual question. Banks v. Nordstrom, Inc., 57 Wash. App. 251, 260-61, 787 P.2d 953 Wash. App. (1990); Peterson v. Littlejohn, 56 Wash.App. 1, 781 P.2d 1329 (1989).

Fourth, Plaintiff fails to set forth any evidence whatsoever that Impulse can prove no set of facts in support of its Third Amended Counterclaim for malicious prosecution based upon F.R.C.P. 12(b)(6). In light of the fact that this Court is required to accept the allegations contained in Impulse's Claims as true and construed in the light most favorable to Impulse while giving Impulse the benefit of every inference that reasonably may be drawn, a denial of the Motion based upon F.R.C.P. § 12(b)(6) is required. Epstein 83 F.3d at 1140; Tyler 136 F.3d at 607.

B. F.R.C.P. 56

Alternatively, Plaintiff suggests that the Court convert its F.R.C.P. §12(b)(6) motion to a summary judgment motion under F.R.C.P. 56. Plaintiff argues that "as established by the Washington State Supreme Court," the hurdle Plaintiff must clear to defeat Impulse's Claims for malicious prosecution is "not very high" and in a conclusory fashion, that the Gordon Declaration "clears it by a mile." See page 19, lines 12-24 of Plaintiff's Motion. However, Plaintiff fails to cite to any precedent or statutory authority in support of such hyperbole. Certainly, to dismiss well-pled claims on summary judgment prior to discovery would severely prejudice Impulse. As such, the hurdle Plaintiff must clear to defeat Impulse's claims for malicious prosecution must be extremely high. The Gordon Declaration fails to provide any evidence whatsoever to demonstrate that Plaintiff clears such a hurdle, let alone, "by a mile." In reality, the Gordon Declaration does little more than state several legal conclusions and hearsay without any supporting evidence. As such, any immediate order by this Court granting summary judgment to Plaintiff pursuant to F.R.C.P. 56 is significantly premature.

XI. Impulse's Claims For Breach of Contract under F.R.C.P. 12(b)(6) and 56

A. F.R.C.P. 12(b)(6)

Under the terms of the Agreement, Plaintiff was obligated to provide information to Impulse that Impulse would be permitted to use for marketing purposes. In exchange for providing Impulse with Plaintiff's information, Plaintiff was entitled to use the Program and the website. Plaintiff breached the Agreement by providing Impulse with "untruthful and inaccurate" registration information.

Plaintiff argues that there was never a meeting of the minds if, as Impulse contends, Plaintiff never intended to confer the benefit of the bargain and intended to lie. See page 10 line 25 and page 11 lines 1-2 of Plaintiff's Motion. Using Plaintiff's rationale, the element of mutual assent for the formation of a contract would be a subjective standard. However, under Washington law, mutual assent is objectively manifested. That is, would a reasonable person under the circumstances believe that there was a meeting of the minds between the parties. In the case at bar, Impulse was reasonable is assuming that it and Gordon entered into an agreement. As such, Plaintiff argument that a contract was never formed is entirely specious.

Nevertheless, Impulse sufficiently alleges that Plaintiff contractually represented and certified that the registration information provided to Impulse and/or its marketing partners was true and accurate. Plaintiff breached the Agreement and certification by providing Impulse and/or its marketing partners, with inaccurate and untruthful registration information. See

Impulse's Fourth Amended Counterclaim ¶¶31-42 and Fourth Cause of Action contained in Impulse's Third-Party Amended Complaint ¶¶36-46.

In light of the fact that this Court is required to take the allegations contained in Impulse's Claims for breach of contract as true and construed in the light most favorable to Impulse while giving Impulse the benefit of every inference that reasonably may be drawn, the Motion based upon F.R.C.P. § 12(b)(6) should be denied. Epstein 83 F.3d at 1140; Tyler 136 F.3d at 607.

B. F.R.C.P. 56

As with all of Impulse's amended Claims, Plaintiff repeats his request that this Court convert his F.R.C.P. 12(b)(6) motion to dismiss into a F.R.C.P. 56 motion for summary judgment.

In this regard, Plaintiff maintains that Exhibit "F" of the Huston Declaration as well as the Gordon Declaration establish that Plaintiff's purported request that Impulse stop sending e-mail to Plaintiff terminated the Agreement between the parties.

On the one hand, Plaintiff has repeatedly asserted that he requested that Impulse stop sending his e-mails to him but, on the other hand, Gordon has represented that some Third-Party Defendants received e-mail. Gordon continues to rely on the Exhibit "F" of the Huston Declaration as evidence that Impulse somehow sent e-mail to him after someone requested that e-mail stop being transmitted to him. However, Gordon's interpretation of the Huston Declaration and Exhibit "F" is entirely mistaken. As stated above, contrary to Plaintiff's representations, Exhibit "F" does not reflect that Gordon and/or Third-Party Defendant's "opted-out" to receiving "all" e-mails. Rather, Exhibit "F" merely indicates that Plaintiff "opted-out" of from receiving "some" e-mails. As a result, a question of fact arises as to if and when Gordon and/or his family member's "opted-in" again after such "opt-out" occurred.

As such, in adjudicating Impulse's breach of contract Claims, a trier of fact must determine: (1) who requested the commercial e-mails at issue; (2) who allegedly received each and every commercial e-mail from Impulse and/or its marketing partners to formulate a request to have Impulse and/or its marketing partners stop sending e-mail; (3) who issued a request to Impulse and/or its marketing partners to stop receiving each and every e-mail at issue; and (4) if and when Gordon and/or Third-Party Defendants terminated the Agreement. Based upon these yet to be determined factual issues, it is premature for this Court to dismiss Impulse's Claims for breach of contract pursuant to F.R.C.P. 56.

XII. Impulse's Claims For Injunctive Relief under F.R.C.P. 12(b)(6) and 56

A. F.R.C.P. 12(b)(6)

Plaintiff contends that: (1) there is no statutory or common law prohibition against soliciting commercial e-mail, even if it is done with the intent to sue the sender; and (2) the mere act of requesting e-mails, whether by Gordon, the Third-Party Defendants, or anyone else, is "perfectly legal conduct even if the person requesting e-mails intends to sue the sender." See page 14, lines 4-6 and 18-21, respectively, of Plaintiff's Motion.

Such an argument is patently false and an implied admission by Plaintiff that his conduct violated conscience, good faith and other equitable principles. In Brader v. Minute Muffler Installation, Ltd., 81 Wash. App. 532, 538, 914 P.2d 1220, 1223 (Wash. App. 1996) at footnote 14 citing Dollar Systems, Inc. v. Avcar Leasing Systems, Inc., 890 F.2d 165, 173 (9th Cir. (Cal.) 1989) the court stated:

> "The application of the unclean hands doctrine raises primarily a question of fact. Insurance Co. of North America v. Liberty Mutual Ins. Co., 128 Cal. App.3d 297, 306, 180 Cal.Rptr. 244, 250 (1982). The doctrine bars relief to a plaintiff who has violated conscience, good faith or other equitable principles in his prior conduct, as well as to a plaintiff who has dirtied his hands in acquiring the right presently asserted. See Pond v. Insurance Co. of North America, 151 Cal.App.3d 280, 289-90, 198 Cal.Rptr. 517, 522 (1984). "It is fundamental to [the] operation of the doctrine that the alleged misconduct by the plaintiff relate directly to the transaction concerning which the complaint is made." Arthur v. Davis, 126 Cal.App.3d 684, 693-94, 178 Cal.Rptr. 920, 925 (1981) (quotation omitted)."

Similarly, Plaintiff's hands are unclean because they repeatedly provided Impulse with his express consent to receive the e-mails at issue while, at the same time, subjectively believing that the e-mails they allegedly received violated R.C.W. §19.190 et seq. and all the while intending to sue Impulse and/or its marketing partners. Additionally, Plaintiff misrepresented his identity or, allowed others to misrepresent their identities to Impulse using "untruthful and inaccurate" registration information.

With respect to Impulse's Claims, Impulse sufficiently alleges that it has suffered and will continue to suffer irreparable damages unless it is granted injunctive relief. If Impulse is unable to stop the Scheme perpetrated by Plaintiff and further schemes by Plaintiff, Impulse will suffer even further irreparable damages. For this harm and damage, Impulse has no adequate remedy at law and to a large degree the harm to Impulse is incalculable because it is extremely difficult to compute damages for lost of business relationship and good will. Further, Plaintiff fails to address how Impulse failed to allege facts tending to show a prima facie request for injunctive relief. As such, the Motion based upon F.R.C.P. §12(b)(6) should be denied.

B. F.R.C.P. 56

Plaintiff requests that this Court convert his F.R.C.P. 12(b)(6) motion to dismiss into a F.R.C.P. 56 motion for summary judgment. Plaintiff maintains that the Gordon Declaration, Exhibit "F" of the Huston Declaration and the Castelli Declaration demonstrate that Gordon has repeatedly requested that Impulse stop sending any further e-mail to Plaintiff. These Declarations have been discredited hereinabove and questions of fact that arise from these documents are set forth hereinabove. Such documents combined raise a material issue of fact; to wit, who requested that Impulse and/or its marketing partners stop sending the commercial e-mail at issue. Further, a reading of these Declarations versus the Gordon Initial Disclosures indicates that additional triable material issues of fact exist in the Instant Action. As such, the Motion based upon F.R.C.P. 56 should be denied.

XIII. Impulse's Claims For Contribution and Indemnification under F.R.C.P. 12(b)(6) and 56 as against Third-Party Defendants only

A. F.R.C.P. 12(b)(6)

Despite the lack of an appearance by Third-Party Defendant's in response to Impulse's Third-Party Complaint, Impulse will oppose the Motion to dismiss the third-party indemnification and contribution causes of action herein out of an abundance of caution.

Third-Party Defendants misinterpret Impulse's Third-Party cause of action against them for contribution and indemnification. Third-Party Defendants maintain that because Impulse's pleading does not include an allegation that the e-mails in question violated R.C.W. §19.190, it fails to state a claim upon which relief can be granted.

However, Impulse has sufficiently alleged facts tending to show that Third-Party Defendants subjectively believed or consciously avoided knowing that they were receiving e-mails that violated R.C.W. §19.190 et seq. To the extent that Impulse is liable to Plaintiff, Impulse adequately alleges that Third-Party Defendants contributed to all or some of Plaintiff's alleged damages by: (1) continuing to demand that Impulse transmit the e-mails at issue while, at the same time, subjectively believing that the e-mails they allegedly received violated R.C.W. §19.190 et seq.; and (2) permitting Plaintiff to misrepresent his identity to Impulse using registration information belonging to Third-Party Defendants. Such improper and inequitable conduct violates conscience, good faith and other equitable principles.

Further, such impermissible behavior raises a question of fact. See Insurance Co. of North America 128 Cal. App.3d at 306. Accordingly, the Motion to dismiss Impulse's contribution and indemnification cause of action pursuant to F.R.C.P. 12(b)(6) should be denied in its entirety.

B. F.R.C.P. 56

Third-Party Defendants request that the Court convert their F.R.C.P. 12(b)(6) motion to dismiss Impulse's contribution and indemnification cause of action into a F.R.C.P. 56 motion for summary judgment. In this regard, Third-Party Defendants maintain that Exhibit "F" of Huston Declaration and the Gordon Declaration establish that Third-Party Defendants' purported request that Impulse stop sending e-mail terminated any liability attributable to Third-Party Defendants. Third-Party Defendants have asserted that they requested that Impulse stop sending him e-mails. However, Gordon has made representations in his Initial Disclosures in the Related Action that some Third-Party Defendants (Pritchett and Abbey Gordon) received e-mail. As such, Pritchett and Abbey Gordon are the only individuals with the ability to "opt-out" to receiving e-mail. Based on the foregoing, a trier of fact must determine who issued a request to Impulse and/or its marketing partners to stop receiving the e-mails at issue. Based upon this yet to be determined factual issue, it is premature for this Court to dismiss Impulse's Third-Party cause of action for breach of contract pursuant to F.R.C.P. 56.

CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO F.R.C.P. 56

This Memorandum of Law is submitted by Impulse in support of its Cross-Motion for partial summary judgment pursuant to F.R.C.P. 56. Gordon alleges that Impulse transmitted e-mails to various "electronic mail addresses" located at the Domain. R.C.W. §19.190 et seq. only protects Gordon's individual "electronic mail address," as defined in R.C.W. §19.190.010, and does not protect any other "electronic e-mail addresses" located at the Domain. R.C.W. §19.190 et seq. does not grant Gordon the right to sue on behalf of third-parties. Based on the foregoing, Gordon lacks standing, as a matter of law, to assert claims for damages on behalf of the entire Domain and/or third-parties, individually. Gordon's claims are thus limited to those commercial e-mail messages allegedly transmitted by Impulse to Gordon's individual "electronic mail address."

As the Court is aware, Gordon alleges that Impulse violated R.C.W. §19.190 et seq. R.C.W. §19.190 et seq. provides that:

> (1) No person may initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in Washington or **to an electronic mail address** that the sender knows, or has reason to know, is held by a Washington resident that:
>
> > (a)Uses a third-party's internet domain name without permission of the third-party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or

> (b)Contains false or misleading information in the subject line.
>
> (2) For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address. (emphasis added).

Pursuant to R.C.W. §19.190.010, the term "Electronic mail address" means "a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered." R.C.W. §19.190.010 separately defines the term "Internet domain name" as referring "to a globally unique, hierarchical reference to an internet host or service, assigned through centralized internet naming authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy." It is not coincidental that the Legislature differentiated between the terms "Internet domain name" and "Electronic mail address" as these terms mean different things and trigger different consequences under R.C.W. §19.190 et seq.

Courts should construe statutes sensibly to effect legislative intent and, if possible, avoid unjust and absurd results. State v. Vela, 100 Wash.2d at 641, 673 P.2d 185. A court gives effect to the legislative purpose of a statute by examining its language as a whole and its legislative history. State v. Hughes, 80 Wash. App. 196, 199 907 P.2d 336 (Wash. App. 1995); Smith v. Showalter, 47 Wash. App. 245, 248-49, 734 P.2d 928 (1987). Based on this precedent, Impulse maintains that the State of Washington Legislature (the "Legislature") specifically intended to differentiate the terms "Electronic mail address" and "Internet domain name" when enacting R.C.W. §19.190 et seq.

Accordingly, Gordon only has legal standing and authority to allege against Impulse violations of R.C.W. §19.190 et seq. that arise from commercial e-mail allegedly transmitted by Impulse to Gordon's individual "electronic mail address" and cannot maintain valid causes of action against Impulse for commercial e-mail allegedly transmitted by Impulse to other "electronic mail addresses" located at the entire Domain.

Moreover, based upon a reading of the statute, it is possible that an individual "electronic mail addresses" located at the Domain belongs to residents of other states. By way of example, an electronic mail address located at the "IBM" domain can be attributable to individuals that reside in multiple states throughout the country i.e. NewYorkresident@IBM.com, Californiaresident@IBM.com, or Arizonaresident@IBM.com.

Simply put, the Legislature intended to prohibit the transmission of a commercial electronic mail message to an "electronic mail address." Had the Legislature intended to extend liability to an entire domain, the term "Internet Domain name" would have been inserted within R.C.W. §19.190.020(1). The fact that the Legislature did not include the term "Internet domain name" in the express language of R.C.W. §19.190.020(1) proves this point. Given that the Legislature defined the term "Internet domain name" in R.C.W. §19.190.010, it can be inferred that the legislative intent was to limit liability, as a matter of law, to a specific class of commercial e-mail sent to an "electronic mail address" and not an "Internet domain name."

Based on the foregoing, Impulse respectfully requests partial summary judgment pursuant to F.R.C.P. 56 as Plaintiff lacks standing, as a matter of law, to assert claims for damages on behalf of "electronic mail addresses" located at the entire Domain.

Dated: New York, New York
September 23, 2005

S/ FLOYD E. IVEY

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